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No. 459

DEC 13 1948

IN THE

Supreme Court of the United States

OCTOBER TERM—1948

LAURIE J. CARPENTER,

Appellant,

—v.—

ERIE RAILROAD CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

LAURIE J. CARPENTER,
Plaintiff in Person,
458 W. 35th St.,
New York 1, N. Y.

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IN THE

Supreme Court of the United States

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LAURIE J. CARPENTER,

Appellant,

—v.—

ERIE RAILROAD CO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF OF PLAINTIFF IN PERSON

PETITION FOR CERTIORARI

To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Laurie J. Carpenter, respectfully submits his petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit in the above entitled case.

The Court of Appeals for the Second Circuit has affirmed an order dismissing the complaint in the District Court of the United States for the Southern District of New York.

The jurisdiction of the Court is where a Court of Appeals has rendered a decision in conflict with the decision

of another Court of Appeals on a different matter and where a Court of Appeals has decided a Federal Question in a way probably in conflict with applicable decisions of this Court.

The only question presented is the time of accrual of a cause of action under the Federal Employers Liability Act.

The reason relied on is the decision in *Federal Reserve Bank* v. *Atlanta Trust Co.*, 5 Cir. 91 F. 2d 283-286, 117 A. L. 1160. "Time begins to run under statutes of limitation as to 'Causes of action' only after the right to prosecute them to a successful conclusion has accrued" and the decision of this Court that "The time when a cause of action accrues has been settled by repeated decisions of this Court to be when a suit may be legally instituted." Ref. *United States ex rel. Louisville Cement Co.* v. *Interstate Commerce Commission*, 246 U. S. 638, 62 L. Ed. 914, 38 S. Ct. 408. Also two decisions of State Courts of New York and New Jersey.

LAURIE J. CARPENTER,
Plaintiff in Person,
458 W. 35th St.,
New York 1, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM—1948

LAURIE J. CARPENTER,

Appellant,

—v.—

ERIE RAILROAD CO.

BRIEF IN SUPPORT OF PETITION

Jurisdiction of the Court

The jurisdiction of the Court is invoked for the reason that the decision of the Court of Appeals is in conflict with the decision of another Court of Appeals on a different matter and is probably in conflict with the applicable decisions of this Court.

Statement of the Case

Plaintiff filed a complaint alleging that there had been former actions that were unsuccessful for the reason that the amount of damage was insufficient to recover and alleging that an amount of damage that could be now shown was sufficient to recover.

Defendant moved for summary judgment on the ground that the pleadings and prior proceedings in the District Court show that there is no genuine issue of any material

fact and Defendant is entitled to judgment as a matter of law.

On the argument Plaintiff attempted to show that it is a general rule in New York that a cause of action accrues on the first discovery of facts creating a liability and an order of non suit in a former action did not cover future damage.

The Court questioned such a rule as applying to an injury in New Jersey and entered judgment with a signature "Memorandum endorsed".

Briefs were filed on appeal but no oral argument by the Plaintiff.

ARGUMENT

Summary

1. Plaintiff has shown six cases where a cause of action accrued at a time different from the first wrong and tending to show that a cause of action does not accrue until it can be audited for the amount of damage. These six cases would refer more cases.

2. There is a second negligence in this case, that of the medical care assigned by the Defendant to accomplish a cure in a reasonable length of time.

3. The former actions are void as a limitation is a limitation on the right and not on the remedy and there is no jurisdiction to apply an order of a former action to this one. Yet a former action is sufficient ground to demand admissions.

4. A jury might be designated to determine the time of accrual of a cause of action as a finding of fact.

ARGUMENT

1. The six cases of a delayed accrual of a cause of action are:

Condor Petroleum Co. v. *Green,* 164 S. W. 2d 713, page 718:

> "Before it can be said a cause of action exists in a legal sense, there must be such a mature right as may be declared upon and maintained."

In that case it is stated a cause of action could not be determined until the price of oil could be determined.

Federal Reserve Bank v. *Atlanta Trust Co.,* 5 Cir. 91 F. 2d 283-286, 117 A. L. 1160:

> "Time begins to run under statutes of limitation as to 'Causes of action' only after a right to prosecute them to a successful conclusion has accrued."

Los Angeles County v. *Metropolitan Casualty Co. of N. Y.,* 26 P. 2d 699, 27 Pac. 2d 914. Page 700 of 26 Pac. 2d:

> "A cause of action does not accrue until a party owning it is entitled to begin and prosecute an action thereon."

United States ex rel. Louisville Cement Co. v. *Interstate Commerce Commission,* 246 U. S. 638, 62 L. ed. 914, 38 S. Ct. 408. Page 644 of 246 U. S.:

> "The time when a cause of action accrues has been settled by repeated decisions of this Court to be when a suit may be legally instituted."

Weinstein v. *Blanchard*, 162 A. 601-2, 109 N. J. L. 332. Page 603 Atlantic or Page 338 New Jersey Law:

> "• • • We believe the point that is dispositive of the case is, Could plaintiff have brought an action at the time of the alleged act and recover • • • "

In the present case the Hudson County Circuit Court said in a former action (at the time) the Plaintiff could not have recovered.

Inkawich v. *State*, 22 N. Y. S. 2d 761:

> "Cause of action accrued when damages are ascertainable."

That case cites several others of a delayed accrual of a cause of action.

2. There is a second negligence in this case. From suits not wholly negligence, *tort feasors* are not combined in a single action but in an action for negligence the party liable for the original negligence is also liable for the negligence of medical care.

In *White* v. *Matthews*, 221 App. Div. (N. Y.) page 553:

> "• • • Undoubtedly one who is responsible by his negligence for injuries sustained by another is not only responsible for the immediate injuries received but is also responsible for the aggravation thereof caused by unskilful surgical treatment • • • "

There is a similar statement in *Hoehn* v. *Schenck*, 221 App. Div. (N. Y.), page 374:

"• • • I am not gainsaying the well settled proposition that where one is injured by the negligence of another he is not responsible for the mistaken advice of a competent physician upon which the injured person acts in good faith and with ordinary care, and that in such circumstances the negligent party is liable for all the consequences following the wrong • • • •"

There would have been a more complete recovery in the present case, if plaintiff had been laid up for a period required for healing and a supplementary medicine given to prompt healing.

3. The former actions are void. The opinion case *Moore* v. *Atkinson, Topeka and Sante Fe Railroad*, 187 Okla. 534, 104 Pac. 236, quotes from *Seaboard Air Line* v. *Brooks*, 151 Ga. 625, 107 S. E. 878, which is in turn from another case, *Morrison* v. *B. & O. R. Co.*, 40 App. D. C.

The doctrine is that a limitation on a right created by statute can not be extended but a limitation on a remedy to a right that existed before can be extended for sufficient cause.

From that analogy former actions with a limitation on the right are void. But in Federal Rule 8d an allegation similar to a former action should be admitted.

The admission is based on *Samilow* v. *Peck*, 257 App. Div. (N. Y.) 1073:

"Pleaded facts are deemed admitted on a motion to dismiss complaint for insufficiency."

Cole v. *Leay*, 212 App. Div., page 91, *Maylander* v. *Fulton County G. & E. Co.*, 131 Misc. (N. Y.), page 518:

> "Facts alleged in complaint are deemed admitted but conclusions of law or fact are not admitted."

The present action is not exactly the same as the former action. In the opinion of the former action, Judge Caffey states:

> "* * * The Defendant has moved for judgment dismissing the complaint under Rules 106 and 107 of the Civil Practice Act. I do not think a cause of action is stated * * *"

4. A jury can be designated to determine as a finding of fact, the time of accrual of a cause of action, if need be.

By reference of Corpus Juris, a jury trial determined the time of accrual of a cause of action in *Virginia Ry. and Power Co.* v. *Ferebee*, 78 S. E. 557.

That case embodies a reference to *Goodell* v. *Gibbons*, 91 Va. 608, 22 S. E. 504, page 505:

> "If the burden be upon the Plaintiff to show both a cause of action and the time when it accrued, it is difficult to perceive why the defense of the statute of limitations could not be made under a general issue of nil debet or non assumpsit. If it be a plea by way of confession and avoidance, and if it be necessary that it should be pleaded specifically, by him who relies upon it then the conclusion would seem to follow necessarily that it behooves the pleader of the statute to make out a case to which it clearly applies."

Assuming that the present case comes within the category of *non assumpsit* in the preceding paragraph, it is sometimes said that every contract bears a secret covenant that the other party will do nothing to prevent fulfilling.

The Defendant has compelled the Plaintiff to abide with an injury without the necessary precautions for recovery, by reason of neglect of medical care and it is alleged that only now is it possible to audit the amount of damage involved.

Statement of No Assignment of Errors

There was no assignment of errors in the District Court of the United States for the Southern District of New York.

Respectfully submitted,

LAURIE J. CARPENTER,
Plaintiff in Person,
458 W. 35th St.,
New York 1, N. Y.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 459

LAURIE J. CARPENTER,

Petitioner,

—v.—

ERIE RAILROAD COMPANY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

No opinion was delivered by the United States District Court for the Southern District of New York. The opinion of the United States Court of Appeals for the Second Circuit is officially reported in 170 F. (2d) 73 and reads as follows (R. 23):

> "*Per Curiam*: Affirmed on the authority of *Michalek* v. *United States Gypsum Company*, 2 Cir., 76 Fed. (2) 115, and *Moore* v. *Atchison, Topeka and Santa Fe Railroad*, 187 Okla. 534, 104 P. 2d 236."

Statute Involved

Section 56 of the Federal Employers' Liability Act (45 U. S. C. §56), as in effect on June 12, 1928, provided:

> "No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued."

The period of limitations was subsequently extended from two to three years by Act of August 11, 1939, Ch. 685, §2, 52 Stat. 1404.

Statement of the Case

This is an action commenced on April 6, 1948, under the Federal Employers' Liability Act to recover damages for an injury to plaintiff's foot alleged to have been sustained twenty years ago on June 12, 1928 (R. 7-10). Defendant moved for summary judgment upon the ground that the action was barred by the statute of limitations and that the issue of limitations was already *res adjudicata* between the parties (R. 4-6). The motion was granted and the complaint was dismissed (R. 1-2). The Court of Appeals affirmed (R. 23-24).

This is the fourth and latest of a series of actions brought by plaintiff against defendant on this claim in various jurisdictions over the past two decades. In a prior action commenced in the United States District Court for the Southern District of New York on December 27, 1934, the complaint alleged that "Plaintiff is insane * * *" (R. 18, Par. 29).

In the 1934 action, as in the instant case, plaintiff sought damages for an injury to his foot alleged to have been sustained on June 12, 1928 (R. 14, Par. 4 *et seq.*). Defen-

dant moved for judgment dismissing the complaint and since plaintiff was then, as now, unrepresented by Counsel, Judge Caffey appointed counsel to represent him. In his opinion, dated February 2, 1935, Judge Caffey pointed out (R. 19-20) that the Federal Employers' Liability Act was the only possible basis of Federal jurisdiction of plaintiff's claim, and that the action was barred by the two-year statute of limitations then provided in that Act (45 U. S. C. §56). An order dismissing that action was duly made and entered on February 14, 1935 (R. 21-22).

As appears from Judge Caffey's opinion (R. 19) a still earlier action had been brought by plaintiff against defendant in the State Court of New Jersey, which resulted in a non-suit on September 29, 1932.

As appears from the *Per Curiam* opinion in *Carpenter* v. *Erie R. Co.*, 132 F. 2d 362 (C. C. A. 3rd, 1942), cert. den. 318 U. S. 788, still another action was brought by plaintiff in the United States District Court for the District of New Jersey subsequent to Judge Caffey's decision and prior to the institution of the instant action. The dismissal, upon the ground of limitations, of the action brought in District of New Jersey was affirmed by the Court of Appeals for the Third Circuit and plaintiff's petition for certiorari was denied by this Court on April 12, 1943.

ARGUMENT

The decision below was clearly correct.

A cause of action under the Federal Employers' Liability Act accrues on the date of the accident and the period within which suit must be commenced runs from that date. *Reading* v. *Koons*, 271 U. S. 58, 63 (1926).

Since it affirmatively appeared from the face of the complaint that the instant action was not commenced until

some twenty years after the accrual of plaintiff's cause of action, it was required to be dismissed and defendant's motion for summary judgment was properly granted. *Carpenter* v. *Erie R. Co.*, 132 F. (2d) 362, cert. den. 318 U. S. 788.

The fact that plaintiff's claim was barred by the statute of limitations was *res adjudicata* under the earlier holding of the United States District Court for the Southern District of New York in the 1934 action between the parties. *Laurie J. Carpenter* v. *Erie Ry.*, L. 60, P. 20 (R. 19-22).

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

DAVIS POLK WARDWELL SUNDERLAND & KIENDL,
Attorneys for Respondent.

EDWARD J. MCGRATTY, JR.,
Of Counsel.

New York, N. Y., January 11, 1949.